SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SPARTAN'S INDUSTRIES, INC., ET AL., *Appellants*,

v.

THE STATE OF TEXAS, *Appellee*.

On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

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v.

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On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

Appellants, who are listed in Appendix C to this Statement (p. 26a, *infra*), appeal from a judgment of the Supreme Court of Texas, which sustained against federal constitutional challenge the validity of a state statute under which the Texas authorities seek to prohibit the appellants from engaging in business activities on consecutive Saturdays and Sundays.

OPINION BELOW

The trial court, the 45th District Judicial District Court of Bexar County, Texas, did not write an opinion. The opinion of the Supreme Court of Texas is reported at 447 S.W.2d 407 and is printed in Appendix B to this Statement (pp. 3a-24a, *infra*).

JURISDICTION

This is a proceeding in which the appellants defended against a suit to enjoin conduct of their businesses on consecutive Saturdays and Sundays on the ground that the statute pursuant to which state authorities were proceeding against them was invalid under, among other things, provisions of the United States Constitution. The injunction was denied by the trial court. The Supreme Court of Texas, in a judgment (p. 25a, *infra*) disposing finally of appellants' federal constitutional claims, reversed the trial court and upheld the validity of the statute. The Supreme Court's judgment was entered on November 5, 1969. A timely filed petition for rehearing was denied on December 3, 1969. A notice of appeal to this Court was filed in the Supreme Court of Texas on February 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Cases that sustain the jurisdiction of this Court include *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95 (1962); *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U.S. 266 (1936); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

STATUTES INVOLVED

Article 286a of the Texas Penal Code, Vernon's Ann. P.C. art. 286a, is set out below. Articles 283, 284, 285, 286 and 287 of the Texas Penal Code are set out in Appendix A to this Statement (pp. 1a-3a, *infra*).

VERNON'S ANNOTATED PENAL CODE OF TEXAS

Art. 286a. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Ses. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding

six (6) months or by a fine of not more than Five Hundred Dollars ($500.00), or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Occasional sales

Sec. 5. Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act.

QUESTIONS PRESENTED

1. Whether a state statute that lists categories of articles and goods and prohibits their sale on both of the two consecutive days of Saturday and Sunday deprives merchants to whom it applies of liberty or property without due process of law in violation of the Fourteenth Amendment because it bears no rational

relationship to the legitimate legislative purpose of so-called Sunday closing laws, *i.e.*, to provide for a common day of rest and tranquillity.

2. Whether such a statute denies to merchants to whom it applies the equal protection of the laws because it subjects their businesses to rules and sanctions different from those applicable to other businesses and there is no rational basis for the classification in view of the purpose and effect of the statute establishing it.

3. Whether a criminal statute that lists, without definition, nearly 50 categories of articles and goods, a number of them not self-defining, and forbids their sale on the two consecutive days of Saturday and Sunday deprives merchants to whom it applies of liberty or property without due process of law in violation of the Fourteenth Amendment because it is so vague as not to give them fair warning of what conduct on their part is proscribed.

STATEMENT

A Texas statute makes it unlawful to sell 46 named categories of articles and goods on both of the two consecutive days of Saturday and Sunday. The items listed may be described roughly as those that are sold in department stores. The terms used in the list are not defined by the statute, and not all such terms are self-defining. They overlap with one another, and they range from such specifics as "television sets" to generalities like "home appliances" and "hardware." This Texas statute, enacted in 1961 as Article 286a of the Penal Code, was obviously motivated by the same animus toward the seven-day operation of discount department stores that lay behind the 1959

Pennsylvania statute that this Court considered in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 590-91 (1961).

Violation of the statute is a misdemeanor, carrying a penalty of a $100 fine for the first offense and a jail term of six months or a $500 fine or both for a subsequent offense. Section 4 of the statute makes "the operation of any business . . . contrary to the provisions of" the Act a public nuisance and authorizes injunction proceedings to restrain any violation of the statute.

Texas' existing Sunday closing laws, Articles 286 and 287 of the Penal Code, were not repealed when Article 286a was enacted. Article 286 is a general Sunday closing law, applying to merchants, grocers, dealers and traders and proprietors of places of public amusement and carrying a fine of $20 to $50. Article 287 excepts certain kinds of goods and establishments from Article 286. Section 5a of Article 286a provides that Articles 286 and 287 do not apply to sales of items listed in Article 286a. Only Article 286a is enforceable by injunction.

In this case a district attorney invoked the injunctive provisions of Article 286a against these appellants, four discount stores in San Antonio and some of their employees, asking that they be enjoined from selling merchandise in violation of the statute. (Tr. 1-9).[1] When the suit was filed the trial court granted a temporary restraining order and fixed a date for a hearing on a temporary injunction. (Tr. 10-11). The parties elected to be heard instead on certain pleas entered by the defendants that, if decided favorably

[1] "Tr." citations are to the transcript of record in the trial court, which constituted the record in the Texas Supreme Court and is Document 1 in the record filed in this Court.

to them, would finally dispose of the case without the necessity for a hearing on the preliminary injunction. Among other things, the defendant stores and their employees pleaded that on several counts the statute was unconstitutional as in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution. (Tr. 13, 15-23, 40). The trial court sustained the constitutional challenge and on that basis denied the injunctive relief the district attorney had sought. (Tr. 60-61).

On appeal the Texas Supreme Court, with its Chief Justice and two associate justices dissenting, reversed the trial court, sustaining the constitutionality of the statute. (P. 3a, *infra*). It finally and expressly disposed of the appellants' federal constitutional claims but remanded for determination of non-federal issues. Compare *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n. 4 (1964). The dissenting justices would have held the statute unconstitutional. (P. 14a, *infra*).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court's decisions in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), and the companion cases—now nearly a decade old—have not stilled judicial controversy over the Sunday closing laws or blue laws of the states. The volume of litigation concerning the validity and application of particular blue laws may not even have diminished since *McGowan* was decided.

The questions that surround Sunday laws are by no means trivial. The 222 pages of opinions on the subject that this Court handed down in the 1960 Term attest to that. The constitutional questions raised in this case, relating to a kind of statute not considered

in *McGowan* and its companions, are substantial enough to have divided justices of the highest courts of several states. They deserve the plenary consideration of this Court.

We offer the following background to put the questions in perspective.

Frequently complex, vague and uncertain in their application, and not especially popular, Sunday laws invite nonenforcement, selective enforcement and litigation.[2] The situation in Texas is illustrative. Since

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[2] A respected national newspaper recently carried a long story headlined, "Seven-Day Operation Upsets Some Retailers, But Customers Like It." The story describes extensive Sunday shopping in a state with a Sunday closing law containing only the customary exemption for necessities. Wall Street Journal, Dec. 10, 1969, p. 1, col. 1. The Associated Press quotes an Ohio district attorney as saying, "Nobody enforces the law, I guess because it's an unpopular one," and describes large-scale Sunday selling operations in a number of states. San Antonio News, Jan. 15, 1970, p. 1-B. The Virginia Supreme Court of Appeals noted testimony before legislative committees to the effect that Virginia's Sunday law as it existed prior to 1960 "was being extensively violated and it had become practically unenforceable because its language was too general and the language of the exception prescribed for 'works of necessity or charity' contained therein was uncertain and confusing to law enforcement officers, juries and the general public." Mandell v. Haddon, 202 Va. 979, 984-85, 121 S.E.2d 516, 521 (1961). "Enforcement of the [Sunday] statute by criminal process has been spotty and sporadic," and "large numbers of people openly flout them [blue laws] with impunity." Arlan's Dep't Store v. Commonwealth, 369 S.W.2d 9, 13 (Ky. 1963). See also State v. Gamble Skogmo, Inc., 144 N.W.2d 749, 764-65 (N.D. 1966).

An index to the volume of Sunday law litigation before this Court decided McGowan v. Maryland, 366 U.S. 420 (1961), is provided by the reported cases cited in Mr. Justice Frankfurter's separate opinion, especially *id.* at 496 n.78, 497 n.82, 508 nn.97 & 98, 509 n.99, 522 n.120, 527 n.128, 528 n.129, 531 n.133, 532 nn. 134 & 135. A number of the reported cases since *McGowan* are cited in this Statement.

1863 Texas has had a criminal statute, now Article 283 of the Penal Code, prohibiting Sunday labor. Article 286, prohibiting the opening of businesses on Sunday, has been on the books since 1871. Each statute has its exceptions, which differ in their scope; sabbatarians, for example, are exempted from the Sunday labor prohibition, Article 284, but not from the Sunday closing law, see Article 287. (For the texts of these statutes, see pages 1a-3a, *infra*). Because of the statutory exemptions and factors that are conducive to nonenforcement—the uncertainty of the statutes, the fairly nominal fines that are the only penalties for violations and the attitudes of the public and of enforcement officers—these statutes have scant effect upon the lives of Texans. Drug stores, food stores and gasoline service stations operate on Sunday freely and openly. So do industrial plants. The court below said that the sanction of Article 286, a maximum fine of $50 (Article 283 carries the same maximum), "is not effective for the considerations of large businesses and busy prosecutors." (P. 8a, *infra*).

The only law with any bite is the statute in issue here, Article 286a, which was superimposed upon the Sunday closing law and its exemptions in 1961 and which is enforced, principally by way of injunction suits, in some but not all Texas counties against stores that would sell the categories of articles and goods named in the statute on consecutive Saturdays and Sundays.

Among the statutes that this Court considered in 1961, Article 286a most nearly resembles the 1959 Pennsylvania statute, also aimed at discount department stores, that was involved in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961), and *Braunfeld* v. *Brown*, 366 U.S. 599 (1961). The Penn-

sylvania statute also listed categories of goods, but it prohibited their sale on Sunday and thus, in this Court's view, in effect merely added special sanctions for Sunday sales of the specified articles to the general long-standing prohibition of Sunday sales.

The Texas statute is very different. In allowing sales on either Saturday or Sunday (and, indeed, not requiring any stores to be closed on either day) the Texas statute departs altogether from the justification that this Court and other courts have found for the extraordinary inhibitions upon otherwise legitimate business activities that the blue laws impose, the setting aside of Sunday as a common day of rest. Substantial questions are thereby raised whether the statute, lacking any relationship to a proper legislative purpose, deprives the merchants subject to it of liberty or property without due process of law and denies them the equal protection of the laws. Moreover, the list of articles and goods set forth in Article 286a, a criminal statute, raises another substantial question that is not concluded by the 1961 cases, *i.e.*, whether the list includes terms so vague and uncertain as not to give the fair warning of proscribed conduct that due process requires.

I

The original purpose of Sunday laws was to ensure that the orthodox Christian sabbath was not profaned.[3] They have evolved, according to this Court (and state courts), into civil regulations that do not offend the establishment clause of the First Amendment or com-

[3] Texas' Sunday Laws, so described in the chapter heading, constitute Chapter Two of Title 7 of The Penal Code. Title 7 is entitled "Religion and Education."

parable provisions of state constitutions. See *McGowan* v. *Maryland*, 366 U.S. 420, 429-53 (1961); *id.* at 508 n.98 (state cases). The justification uniformly given for the Sunday laws as non-religiously motivated infringements upon the customary right of a merchant to open his place of business and sell what he wishes when he wishes has been that a legislature may prescribe for the inhabitants of a state a common day of rest. The Court put it this way in the *McGowan* case, in explaining that state legislatures had more in view in enacting Sunday laws than merely ensuring one day's rest in seven:

> "[T]he State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days." *Id.* at 450.

In *Sherbert* v. *Verner*, 374 U.S. 398, 408 (1963), the Court described the decision in *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), one of the companions to the *McGowan* case, where a statute was upheld against a claim that it interfered with the free exercise of religion, as resting on "a strong state interest in providing one uniform day of rest for all workers."

Appellate tribunals of a number of states likewise have found the justification for the infringement on liberty and property that blue laws involve in the desire to set aside a common day of rest.

> "Since the statute, enacted under the police power of the State, serves a strong state interest in pro-

> viding one uniform day of rest for its citizens, it does not violate the Constitutional provisions respecting the establishment of religion or the free exercise thereof." *State* v. *Solomon*, 245 S.C. 550, 568, 141 S.E.2d 818, 828 (1965).

And the Wyoming Supreme Court, after citing this Court's 1960 Term opinions, said that Sunday statutes "are . . . countenanced as having for their purpose the general welfare of the people by providing a day devoted to rest, repose, recreation, tranquility, and family togetherness . . . ." *Nation* v. *Giant Drug Co.*, 396 P.2d 431, 434 (Wyo. 1964). See also these recent cases: *Courtesy Motor Sales, Inc* v. *Ward*, 24 Ill. 2d 82, 84-85, 179 N.E. 2d 692, 693 (1962); *State* v. *Target Stores, Inc.*, 279 Minn. 447, 456-57, 156 N.W. 2d 908, 915 (1968); *GEM Stores, Inc.* v. *O'Brien*, 374 S.W. 2d 109, 116-17 (Mo. 1963); *Terry Carpenter, Inc.* v. *Wood*, 177 Neb. 515, 521-23, 129 N.W. 2d 475, 479 (1964); *Charles Store Co.* v. *Tucker*, 263 N.C. 710, 715-16, 140 S.E. 2d 370, 374 (1965); *Mandell* v. *Haddon*, 202 Va. 979, 989-91, 121 S.E. 2d 516, 524, 525 (1961); *State ex rel. Black's, Inc.* v. *Gates*, 149 W. Va. 421, 437-39, 141 S.E. 2d 369, 381-82 (1965).

Article 286a of the Texas Penal Code does not fit within the common-day-of-rest justification. It permits Sunday sales—sales that, according to the law on the books at least, were illegal before Article 286a was enacted. It is small wonder, then, that when Article 286a and statutes like it have been challenged, some judges of state courts of last resort have been unable to conclude that they bear the constitutionally necessary reasonable relationship to some legitimate legislative purpose. The Chief Justice and his two colleagues who dissented from the decision below found it

"difficult to see" how the common day of rest "argument can now be used to support and sustain a Sunday opening law which is calculated to result in some members of families working on Saturday and resting on Sunday while other members rest on Saturday and work on Sunday." (Pp. 21a-22a, *infra*). Concerning a similar Michigan statute, an opinion joined by three justices of the Michigan Supreme Court said that its

> "sole and only objective . . . is to eliminate, or at least reduce, competition, since the general welfare is neither enhanced nor promoted, and since no evil is eliminated by the Act, it must be concluded that it is not a valid and proper exercise by the legislature of its police power." *Arlan's Dep't Stores, Inc.* v. *Kelley*, 374 Mich. 70, 75, 130 N.W.2d 892, 894 (1964).

In the same vein, the dissenters below said that "the proscriptions of Art. 286a have no reasonable relationship to the health, recreation or welfare of the people . . . ," and therefore the statute "is an arbitrary exercise of the police power. . . ." (P. 24a, *infra*).

This Court said in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95 (1962), "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests," and it quoted from *Lawton* v. *Steele*, 152 U.S. 133, 137 (1894), "the classic statement of the rule," which is that

> "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Here, we submit, the interests of the public do not require the interference with these appellants' businesses that Article 286a works; the means chosen are not reasonably necessary to serve any legitimate interests of the public, and the appellants are unduly oppressed, not in the interests of the public but solely in the interest of competitors who do not enjoy all the rigors of competition. To say that in these circumstances the Texas statute is invalid under the due process clause is not to ignore opinions of this Court such as those in *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), and *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). It is simply to recognize that there comes a point at which legislation, even legislation dealing with economic affairs, becomes, for want of relationship to any legitimate public purpose, arbitrary, nothing more than harassment of those subject to it. *Cf. McGowan* v. *Maryland*, 366 U.S. 420, 542-43 (1961) (opinion of Frankfurter, J.) The question whether Article 286a is such an arbitrary statute is a substantial one.

The question is particularly substantial in the case of Article 286a because not only does that statute fail the common-day-of-rest rationale, but it does not even have any necessary tendency to promote "a one-day-in-seven work stoppage," *McGowan* v. *Maryland*, *supra* at 450, or, as the court below put it, a "one day a week surcease from commerce" (p. 9a, *infra*). It commands the closing of no business either on Saturday or Sunday but merely prohibits the sale of specified articles and goods on both of those days. Drug stores and food stores, for example, which sell many of the articles listed in Article 286a, are legally open on consecutive Saturdays and Sundays. There have been

cases in which other kinds of stores have stayed open on both Saturday and Sunday, with certain sections roped off on one day or the other. *Hill* v. *Gibson Discount Center,* 437 S.W. 2d 289, 290 (Tex. Civ. 1968). Article 286, the general Sunday closing law, does not apply in such circumstances to prohibit the opening of the store on Sunday. *Ex parte Wilson,* 374 S.W. 2d 229 (Tex. Civ. 1964). Compare *County of Spokane* v. *Valu-Mart, Inc.,* 69 Wash. 2d 712, 419 P.2d 993 (1966), in which it was held that a municipal ordinance barring the sale of named commodities on Sunday was void as an invalid exercise of the police power, in major part because affected stores could remain open and the legislative purpose of securing a common day of rest (or even a day of rest a week) was not served.

II.

Article 286a of the Texas Penal Code singles out named items and some of the merchants who sell them for special adverse treatment. Other merchants are subject only to the unenforced Articles 283 and 286 or are within the exemptions from those articles. Drug stores and food stores are among those exempted and, as the dissent below pointed out, it is

> "a matter of common knowledge . . . that drug stores and grocery stores, which are legally open on the consecutive days of Saturday and Sunday, sell and offer for sale a large number of the listed items on both days. . . ." (P. 19a, *infra*).

Thus, Article 286a effects a discrimination. The discrimination is such as to deny to merchants subject to Article 286a the equal protection of the laws. This is clear under what the Court only a few weeks ago de-

scribed as "the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective." *Turner* v. *Fouche*, No. 23, O.T. 1969, decided Jan. 19, 1970, slip op. p. 15.

If this test is applied, it is immaterial that for some purposes the goods typically sold in discount department stores can be classified separately from other goods or from the same goods sold by others. The question is whether in the context of the particular statute in issue the classification is rationally related to a proper state purpose. "[A] statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud*, 354 U.S. 457, 465 (1957). For example, a state can undoubtedly treat an alien differently from a citizen in some respects, see *Clarke* v. *Deckebach*, 274 U.S. 392 (1927), but it may not use the alien/citizen classification to restrict severely the economic opportunities of aliens because "the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction . . . does not go so far . . . ." *Truax* v. *Raich*, 239 U.S. 33, 41 (1915).

Thus, when the Court held in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 589-92 (1961), that Pennsylvania's 1959 Sunday law reasonably classified for special Sunday treatment a number of the same kinds of articles that are mentioned in Article 286a, it by no means concluded the equal protection claim made here. The Court, as we have said (pp. 9-10, *supra*), saw in the 1959 statute merely a supplement to Pennsylvania's existing Sunday laws

and thought it rational for the legislature to impose heavier penalties for the sale of the listed goods because it might reasonably be thought that the stores that sold them "were particularly disrupting the intended atmosphere of the day." Here there is no such possible rationale or justification for the legislature's action. The reasons have been detailed in the preceding section of this Statement: the statute, which allows stores to open and goods to be sold on Sunday, is not necessarily conducive to any Sunday atmosphere of rest. In short, the considerations that we have urged make the statute violative of due process also make it a denial of equal protection since the device of classification has been used by the legislature. Two state courts of last resort have held that statutes similar to Article 286a in listing items that cannot be sold deny the equal protection of the laws. *Hughes* v. *Reynolds*, 223 Ga. 727, 157 S.E. 2d 746 (1967); *Terry Carpenter, Inc.* v. *Wood*, 177 Neb. 515, 129 N.W. 2d 475 (1964). Compare *Skag-Way Dep't Store, Inc.* v. *City of Omaha*, 179 Neb. 707, 140 N.W. 2d 28 (1966) (city ordinance naming items forbidden to be sold on Sunday invalid for lack of reasonable classification); *County of Spokane* v. *Valu-Mart, Inc.*, 69 Wash. 2d 712, 419 P.2d 993 (1966) (similar county ordinance invalid on same ground, among others). See also, *e.g.*; *Courtesy Motor Sales, Inc.* v. *Ward*, 24 Ill. 2d 82, 179 N.E. 2d 692 (1962). At the very least the question is substantial.

III

If a person of common intelligence who is subject to a criminal statute must guess just what conduct it is that the statute makes criminal, the statute is unconstitutional because it does not give the fair warning

that due process of law requires. The numerous void-for-vagueness cases decided by this Court all go to establish that proposition. *E.g.*, *Musser* v. *Utah*, 333 U.S. 95 (1948); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Connally* v. *General Constr. Co.*, 269 U.S. 385 (1926). Article 286a, listing articles and goods without defining the terms used in the list, is unconstitutionally vague by the established standard.

In the *McGowan* case the Court held that the Maryland statute there at issue, forbidding Sunday sales generally with certain exemptions, was not so vague as to be void. 366 U.S. at 428. The Maryland statute, however, is quite different from Texas' statute. This Court has not considered the validity under this head of due process of a statute like Article 286a. The issue of vagueness was not raised in *Two Guys* or *Braunfeld* v. *Brown* with respect to the 1959 Pennsylvania statute.

In *McGowan* the Court concluded that, among other things, "ordinary commercial knowledge" would tell businessmen what was encompassed by the Maryland Sunday statute and its exceptions. That is not true of Article 286a. "Hardware" is an example of the more troublesome of the terms used in Article 286a. Does that term include automotive parts, fish hooks, razors, shot gun shells, garden hose, sandpaper, paint and water pumps? There are other terms of similar generality whose scope a merchant is left to guess at. Are scarves, bandanas, hair nets and mantillas included in "headwear"? "China" is on the proscribed list. What of pottery, plastic or tin dishes? "Recordings" are listed. Does that include tape recordings? Are portable outdoor barbecue grills within the statute as "home appliances" or "stoves" or "outdoor furni-

ture?"[4] Examples of the uncertainties could be multiplied.

The list of items in Article 286a is very much like a somewhat shorter list in a Minnesota statute. That statute was held unconstitutionally vague in *State* v. *Target Stores, Inc.*, 279 Minn. 447, 156 N.W. 2d 908 (1968). The court there, having set out three examples of ambiguity among several suggested by the parties, said that although it believed

> "that a responsible department store official would be able to determine the classification of many, probably most, commodities, we have been disabused of the belief that there are not numerous other commodities which cannot with certainty be so classified." *Id.* at 470, 156 N.W.2d at 923.

Similarly, two justices of the Michigan Supreme Court would have held a Michigan department-store-list statute very much in the pattern of Article 286a unconstitutionally vague. *Arlan's Dep't Stores, Inc.* v. *Kelley*, 374 Mich. 70, 80-82, 130 N.W. 2d 892, 897 (1964).

The question presented, whether Article 286a, which forbids activities that are not harmful in themselves, describes those activities with enough certainty to meet the standards of the due process clause, is substantial.

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[4] The example is adapted from State v. Target Stores, Inc., 279 Minn. 447, 468-69, 156 N.W.2d 908, 922 (1968), holding a similar Minnesota statute void for vagueness. The case suggests another example: The Minnesota statute names "phonographs and recorders," and the court thought it uncertain whether replacement phonograph needles or hi-fi components were included. Article 286a does not name phonographs (although it does name musical instruments and recordings), and it is not clear whether phonographs (or tape recorders) are to be considered home appliances. It is true that radio and television sets are specifically named, but so are such undoubted home appliances as refrigerators, washing machines and driers.

CONCLUSION

Probable jurisdiction should be noted and the case set down for plenary hearing on the merits.

Respectfully submitted,

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APPENDIX A

Vernon's Annotated Penal Code of Texas

TITLE 7—RELIGION AND EDUCATION

* * *

CHAPTER TWO

Sunday Laws

* * *

Article 283. Working on Sunday

Any person who shall labor, or compel, force, or oblige his employés, workmen, or apprentices to labor on Sunday, or any person who shall hunt game of any kind whatsoever on Sunday within one-half mile of any church, school house, or private residence, shall be fined not less than ten nor more than fifty dollars.

Art. 284. Not applicable

The preceding article shall not apply to household duties, works of necessity or charity; nor to necessary work on farms or plantations in order to prevent the loss of any crop; nor to the running of steamboats and other water crafts, rail cars, wagon trains, common carriers, nor to the delivery of goods by them or the receiving or storing of said goods by the parties or their agents to whom said goods are delivered; nor to stages carrying the United States mail or passengers; nor to foundries, sugar mills, or herders who have a herd of stock actually gathered and under herd; nor to persons traveling; nor to ferrymen or keepers of toll bridges, keepers of hotels, boarding houses and restaurants and their servants; nor to keepers of livery stables and their servants; nor to any person who conscientiously believes that the seventh or any other day of the week ought to be observed as the Sabbath, and who actually refrains from business and labor on that day for religious reasons.

Art. 283. Horse racing or gaming on Sunday

Any person who shall run or be engaged in running any horse race, or who shall be engaged in match shooting or any species of gaming for money or other consideration, within the limits of any city or town on Sunday, shall be fined not less than Twenty Dollars ($20) nor more than Fifty Dollars ($50).

Art. 286. Selling goods on Sunday

Any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employé of any such person, who shall sell, barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined not less than twenty nor more than fifty dollars. The term place of public amusement, shall be construed to mean circuses, theaters, variety theaters and such other amusements as are exhibited and for which an admission fee is charged; and shall also include dances at disorderly houses, low dives and places of like character, with or without fees for admission.

* * *

Art. 287. Permitting sale of certain articles on Sunday; regulations as to motion picture shows

The preceding Article shall not apply to markets or dealers in provisions as to sales of provisions made by them before nine o'clock A. M., nor to the sales of burial or shrouding material, newspapers, ice, ice cream, milk, nor to any sending of telegraph or telephone messages at any hour of the day or night, nor to keepers of drug stores, hotels, boarding houses, restaurants, livery stables, bath houses or ice dealers, nor to telegraph or telephone offices, nor to sale of gasoline, or other motor fuel, nor to vehicle lubricants, nor to motion picture shows, or theatres oper-

ated in any incorporated city or town, after one o'clock P. M.

Sec. 2. The Commissioners or City Council of the towns or cities in which said motion picture shows or theatres are located shall have the right and power by proper ordinance to prohibit or regulate the keeping open or showing of such motion picture shows or theatres on Sunday.

APPENDIX B

Opinion

IN THE SUPREME COURT OF TEXAS

No. B-1253

Direct Appeal From Bexar County

THE STATE OF TEXAS, *Appellant*,

v.

SPARGUR'S ENTERPRISES, INC., ET AL., *Appellees*.

The question in this case is the constitutionality of the Sunday (or Saturday) closing law: Article 286a, Texas Penal Code. We uphold the statute.

The suit was brought by the District Attorney of Bexar County, acting in the name of the State, to enjoin four discount stores operating in Bexar County, Spargur's Industries, Inc., Barker's of San Antonio, Inc., Shoppers World of San Antonio, Inc. and Globe Stores, Inc., together with certain employees, from selling certain items of merchandise on the two consecutive days of Saturday and Sunday in violation of Article 286a. The defendants attacked the constitutionality of the statute in extensive pleadings, and the trial court agreed with their arguments when the case came on for trial. No statement of facts is before us, and the briefs state that no evidence was heard by the trial court.

Jurisdiction

The State has taken a direct appeal to this court under the terms of Article 1738a, Vernon's Texas Civil Statutes. A question of jurisdiction must be faced. It arises because the trial court judgment decrees "that each of the said Pleas in Abatement be and the same are hereby sustained, and that this cause be and the same is hereby dismissed . . ." This disposition of the case, if we were not to look behind the recitation, would not fit the requirement of Article 1738a, which provides that direct appeals to this court may be taken from orders of trial courts "granting or denying an interlocutory or permanent injunction on the ground of the constitutionality or unconstitutionality of any statute . . ." Upon reading the full transcript we find that defendants' only ground for their "plea in abatement" was the unconstitutionality of the statute. The trial court gives the unconstitutionality of the statute as the reason for its judgment and decrees "that Plaintiff, the State of Texas, take nothing by its suit for injunctive relief against the Defendants . . ." We treat the so-called plea in abatement as a plea in bar and, since the trial court's take-nothing judgment could be the only intended judgment, the language as to the dismissal is disregarded as meaningless. When the judgment is thus interpreted, it denied the permanent injunction sought by the State on the ground of the unconstitutionality of Article 286a, and this court has jurisdiction of the direct appeal.

This holding may be compared to the one in *Touchy* v. *Houston Legal Foundation*, 432 S.W. 2d 690 (Tex. Sup. 1968). In *Touchy*, the defendants filed a plea in abatement based on lack of standing of the plaintiffs to maintain the suit, and also filed a motion for summary judgment that plaintiff take nothing. The trial court heard the two pleas at the same time and rendered judgment reciting that the plea in abatement was sustained and the cause was dismissed, and further reciting that the motion for summary

judgment was granted. Since the asserted ground of the plea in *Touchy* was a proper ground of abatement, we dealt with that ground and with the action of the trial court in dismissing the case. If the trial court could not have reached the merits of the case, its recitation of a ruling on the summary judgment motion had to be regarded as meaningless. In the case at hand, there was no ground for abatement and we regard the language as to abatement and dismissal as meaningless.

The corporate defendants first argue that Section 1 of Article 286a prohibits consecutive day sales by "any person," and that this must be construed to apply only to natural persons and not to corporations. Since this question is entirely separate from any constitutional issue, we decline to consider it on the ground of the limitation of our jurisdiction in a direct appeal. *Halbouty* v. *Railroad Commission*, 163 Tex. 417, 357 S.W. 2d 364 (Tex. Sup. 1962).

Article 286a was enacted by the Legislature in 1961. Section 4a of the statute as originally enacted permitted the sale of otherwise prohibited commodities when the purchaser certified to the seller that his need of the item was an emergency. The construction of this section brought the statute to this court in 1964 in *State* v. *Shoppers World, Inc.*, 380 S.W. 2d 107. The question there was whether the seller could rely on the purchaser's certificate, or whether the statute required that there be no sale in the absence of an actual emergency. The court upheld Sec. 4a by construing it not to require an objective determination by the seller. The State argues in the case before us that this court has already determined the constitutionality of Article 286a in its entirety, but the opinion makes it quite plain that the attack on Sec. 4a was the only constitutional issue considered. The defendant there had obtained certificates from its purchasers and, as the law was construed by this court, there had been no violation. The court of civil appeals had properly ruled that the State was not

entitled to an injunction, and there was no cause for this court to rule further.

The Legislature removed Sec. 4a from this Article in 1967.

Citing Article I, Sections 15, 17 and 19 of the Texas Constitution, and Article XIV of the United States Constitution, appellees contend that Article 286a discriminates against them and denies them equal protection or immunity that it denies them due process of law by virtue of vagueness or uncertainty of the prohibited act, that it takes or damages their business or property without compensation, that it authorizes the injunction of a nuisance where there is no nuisance in fact, and thus denies the right to a jury trial on that issue, and that it denies them due process by prohibiting or unduly oppressing a lawful business in a manner which has no reasonable relation to the public health and welfare. Finally, they contend that the caption of the original Act of the Legislature failed to comply with Article III, Section 35 of the Texas Constitution.

The statute has been upheld against similar attack in two of the courts of civil appeals in three opinions: *Spartan's Industries, Inc. v. State*, 379 S.W. 2d 931 (Tex. Civ. App. 1964, no writ); *Hill v. Gibson Discount Center*, 437 S.W. 2d 289 (Tex. Civ. App. 1968, appl. pend.); *State v. Sandaco, Inc.*, (Eastland Civ. App., August 29, 1969).

Effect and Objectives of the Statute

Before weighing specific constitutional appeals against the precedents, we should understand what the Legislature has done by its enactment of Article 286a. We may as well decide at the outset whether this enactment has a reasonable relation to the public welfare. Has the Legislature arbitrarily interfered with the merchants of Texas, or can it be said that a proper objective is served by this law? Whether the statute is a legitimate exercise of the

police power of the state is central to most of the questions now before us.

The full text of Article 286a is set forth in the appendix following this opinion.[1] It specifically provides in Sec. 5a that the older Sunday closing laws are not repealed. Articles 286 and 287, Texas Penal Code, still prohibit sales, or the opening of a place of business, by any merchant and trader (subject to certain exceptions for drug stores, hotels, restaurants, etc.). The penalty for violation of Article 286 is a fine of not less than twenty nor more than fifty dollars.

Article 286a enumerates a long list of articles from clothing to motor vehicles, and gives the business man the choice of trading on either Saturday or Sunday, but provides that if he sells on both days, he may be subjected to injunction or greater penal penalty.

To weigh the full effect of Article 286a we must decide whether it prohibits the sale by the same person of one or more of the named articles on Sunday when different articles, but ones named in the statute, were sold on the preceding Saturday. Thus, could a merchant close off his appliance department on Saturday, and then operate on Sunday with nothing but his appliance department open? We construe the statute to prohibit this. It says that any person who sells on both days shall be guilty of a misdemeanor. Who sells *what*? Who sells "*any* clothing; clothing accessories; wearing apparel"; etc., meaning that if "any" named item is sold on one day, it is illegal to sell "any" named item on the other day. The statute does *not* say to the merchant that he may not sell clothing, or sell clothing accessories; or sell wearing apparel on consecutive days. The effect of separating each article between the semicolons and applying the prohibition only to consecutive day sales of a separate article, would be

[1] The appendix is omitted in this printing. Article 286a is set out at pp. 2-4, *supra*.

to have the Legislature permit a merchant to sell watches on Saturday and clocks on Sunday, blinds and draperies on Saturday and curtains on Sunday, washing machines and radios on Saturday and dryers and television sets on Sunday. This would be a nonsensical plan to ascribe to the Legislature.

To judge the reasonableness of this statute, we have before us only the face of the statute with no evidence, but it appears there that the principal plan is to close mercantile establishments and department stores on Sunday. This is the reason for the broad list of commodities, the injunction process, and the provision in Sec. 5 that the statute applies only to those "engaged in the business of selling such items." The merchant is given a choice between Saturday and Sunday, but who will choose to close on Saturday except the Sabbatarian? Defendants plead that this suit is an attempt to prevent them "from remaining open on Sundays." Surely Saturday is still the far better day for sales than is Sunday.

The most important feature of Article 286a, in practical effect, is Sec. 4 which authorizes an injunction to enforce the prohibition of the statute. Without this provision, the sanction of Article 286 is a fine of no more than $50. That sanction is not effective for the considerations of large businesses and busy prosecutors. Defendants plead that this injunction is an attempt to prevent them "from remaining open on Sundays." Indeed, that is the effect of the statute and the intent of the injunction suit. Without Article 286a the Sunday sale of all of these commodities would be prohibited by Article 286, and the defendants would be in violation of that law were they then to engage in the activities which they would protect by appeal to the Constitution. Apparently they are not seriously troubled by the prohibitions of the law in the absence of the injunctive process.

Sunday closing laws have been attacked vigorously, both in and out of the courts, for discriminating against

persons whose religion requires them to take a day of rest on some day of the week other than Sunday. *McGowan v. Maryland*, 366 U.S. 420, 512, 6 L.Ed.2d 393, 448; *Braunfeld v. Brown*, 366 U.S. 599, 6 L.Ed.2d 563, 81 S. Ct. 1144; Mann and Gartinkel, *The Sunday Closing Laws Decisions—A Critique*, 37 Notre Dame Lawyer 323 (1962); Barron, *Sunday in North America*, 79 Harv. L. Rev. 42 (1965). By provision in Article 284, Texas has long permitted one to labor on Sunday if he actually observes another day of rest for religious purposes. The choice of Saturday or Sunday for the sale of the articles enumerated in the current statute should, at least, remove objections on grounds of religion made by the Sabbatarians.

Since the basis of constitutionality of Sunday closing laws has often been said to be the achievement of a single day of rest for all the family, and for the bulk of the community, it is understandable that opponents would argue that the purpose is breached by allowing merchants a choice between two days. When the question came before the Supreme Court of Michigan in *Arlan's Department Stores, Inc. v. Kelley*, 374 Mich. 70, 130 N.W. 2d 892 (1964), three justices found this feature fatal to the statute and three justices upheld it in this respect. The Supreme Court of Minnesota in *State v. Target Stores, Inc.*, 279 Minn. 447, 156 N.W.2d 908 (1968), found no constitutional defect here, but only "a legislative attempt to alleviate the indirect religious burden upon Sabbatarians."

The objective of one day a week surcease from commerce is served by this statute. That surcease has never been unanimous, for exceptions are always allowed. The Legislature was entitled to expect that Article 286a would yield Sunday operations only by Sabbatarians and perhaps an occasional small storekeeper.

Equal Protection

Defendants argue that they are the victims of discrimination, and are denied equal protection of the law, be

cause the statute raises the penalty and threatens an injunction only against those who are in the business of selling the particularly enumerated articles. This same argument was put forward and answered in *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 589, 6 L.Ed.2d 551, 557. The Pennsylvania statute under consideration imposed a higher penalty for the Sunday sale of named commodities, which were almost exactly the same as those named in Article 286a. The U.S. District Court had found that substantial suburban retail businesses had triggered large scale violations of the Pennsylvania general Sunday closing law, and that the small fine of the older law "was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute." The Supreme Court held that it was within the power of the state legislature to have concluded that these businesses were particularly disrupting and that their violation of the law was of a different dimension, requiring a different remedy. Mr. Justice Frankfurter, in his concurring opinion, upholds the statute because "it singles out the area where a danger has been made most evident, and within that area treats all business enterprises equally. That in so doing it may have drawn the line between the sale of a sofa cover, punished by a hundred dollar fine, and the sale of an automobile seat cover, punished by a four dollar fine, is not sufficient to void the legislation." 366 U.S. 541, 6 L.Ed.2d 465.

The Supreme Court of North Carolina upheld an ordinance which forbade the sale of enumerated commodities very similar to those of Article 286a, saying: "It is both reasonable and practical to require people to do their serious shopping for clothing, furniture, automobiles, house

hold and office appliances, hardware, and building supplies on weekdays." *Charles Stores Company, Inc.* v. *Tucker*, 263 N.C. 710, 140 S.E.2d 370 (1965).

Courts have on occasion invalidated statutes of this nature by doing as the defendants have done in their briefs, holding up the prohibition against the sale of a camera as against the absence of such a prohibition against the sale of camera film and calling for a showing of a distinction related to a day of rest or the public welfare. However, the clear majority of the cases uphold statutes against such attack so long as the statutory scheme, viewed as a whole, is a valid one and so long as it treats all merchants alike without discriminating among competitors. If no one is allowed to sell automobiles, for example, the law is not regarded as discriminatory. Anno.: Validity of Discrimination by Sunday Law Between Different Kinds of Stores or Commodities, 57 A.L.R.2d 975.

In *Watts* v. *Mann*, 187 S.W.2d 917 (Tex. Civ. App. 1945, writ ref'd), the court had before it the constitutionality of Article 4646b, Vernon's Ann. Civ. St., which authorized an injunction against one who made three usurious loans within a period of six months. It was there argued that the law discriminated in favor of usurers who made fewer loans. The court held that it was entirely proper for the Legislature to treat the more serious threat to the law differently from the casual violation. It was pointed out that the pleading of the lenders themselves showed that prior usury laws were ineffective as to the operations of those lenders and that the injunction law was essential. The same can be said of the case at hand, where defendants plead that the public wants to buy from them on Sunday and will be served if the court does not interfere.

Vagueness

The defendants say that the prohibited commodities are set forth in terms so vague and indefinite as to render the statute unconstitutional. Constitutional due process re-

quires that the prohibition of a penal statute must be understandable to a person of common intelligence. Defendants argue that the descriptions of commodities in this statute are so uncertain that the merchant who wants to comply with the law cannot know how to do so. However, virtually all of these terms are common words which will be understood by any merchant. If a marginal or questionable case could be posed for the application of the word "hardware," for example, this would be no ground for vitiating an entire legislative enactment. *United States* v. *Petrillo*, 332 U.S. 1, 91 L.Ed. 1877, 67 Sup. Ct. 1538 (1947); *Jordan* v. *DeGeorge*, 341 U.S. 223, 95 L.Ed 886 (1951).

Various types of Sunday closing laws in many states for many years have prohibited sales by the use of words very similar to those used in Article 286a. They have been upheld against attack for vagueness. *Charles Stores Company, Inc.* v. *Tucker*, 263 N.C. 710, 140 S.E.2d 370 (1965); *State* v. *Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965); *State* v. *McQueen*, 378 S.W.2d 449 (Mo. Sup. Ct. 1964); *Two Guys From Harrison Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 6 L.Ed.2d 551, 81 Sup. Ct. 1135; Anno.: Validity of Sunday Law or Ordinance as Affected by Vagueness, 91 A.L.R.2d 763.

Police Power

The defendants also contend that Article 286a, by interfering with their lawful business, takes their property without compensation, declares a nuisance where there is none, and deprives them of property without due process of law. These contentions are without merit if the statute is a valid exercise of the police power of the state. The Constitution does not require that compensation be paid for loss occasioned by the exercise of the police power. *State* v. *Richards*, 157 Tex. 165, 301 S.W.2d 597 (1957).

It is true that the Legislature may not validly declare something to be a nuisance which is not so in fact, but that depends upon the question of whether that which is de

clared to be a nuisance endangers the public health, public safety, public welfare, or offends the public morals. In *Ex Parte Hughes*, 133 Tex. 505, 129 S.W.2d 270 (1939), the Supreme Court held that no injunction could be granted to stop the relator from collecting usury, since the laws of the state did not then define usury as a nuisance, either public or private. The Legislature then enacted a special statute against usurious lending and provided for an injunction for its enforcement. The statutory injunction was upheld in *Watts v. Mann*, 187 S.W.2d 917 (Tex. Civ. App. 1945, writ ref'd). If the Legislature may prohibit an act, it may authorize an injunction against that act.

Thus we are brought back to the question of the police power of the state, which turns upon the question of whether there is a reasonable relation between Article 286a and the health, recreation and welfare of the people of the state. It is not the function of the courts to judge the wisdom of a legislative enactment. It is only when a statute arbitrarily interferes with legitimate activities in such a manner as to have no reasonable relation to the general welfare, that this court may rule the statute to be unconstitutional on the grounds with which we are here concerned. With the long precedent for the constitutionality of Sunday closing laws in this State, and with the view we take of this statute as set forth above, we hold it to be validly related to the health, recreation and welfare of the people.

Caption

Defendants say that Article III, Sec. 35 of the Texas Constitution, which requires that the subject of an Act be expressed in its title, is violated in the caption of Article 286a for this reason: the caption says that the subject of the Act is to prescribe one list of items which may not be sold on Saturday and another list of items which may not be sold on Sunday. This is an unlikely con-

struction of the caption. The caption need only state the general subject of the Act; it need not explain the details.

Holding Article 286a to be constitutional against the attacks here made upon it, we reverse the judgment of the trial court and remand the cause to that court for further proceedings.

S/ Thomas M. Reavley
Thomas M. Reavley
Associate Justice

Opinion delivered November 5, 1969.

Dissenting Opinion

Any objective evaluation of the constitutionality of Art. 286a should proceed from the incontrovertible premise that the statute is not, as most people are inclined to think, a "Sunday closing law", or even, as the majority of this court has characterized it, a "Sunday (or Saturday) closing law". Rather, as will be demonstrated, it is a "Sunday opening law".

Any suggestion that Art. 286a is a "Sunday closing law", or a "Sunday (or Saturday) closing law", either overlooks or ignores the fact that, by virtue of the statute's provisions, stores in which only the forty-six items or categories of merchandise listed in section 1 are sold or offered for sale may open and engage in business on Sunday under sanction of law for the first time in one hundred years! Moreover, before the enactment of Art. 286a, the opening and operation of such stores and the sale of the listed merchandise on Sunday was absolutely prohibited by Art. 283 and 286; and but for the enactment of Art. 286a, operation of such stores and sale of the listed merchandise on Sunday would still be prohibited

[1] All Article references are to Vernon's Texas Penal Code

by Arts. 283 and 286. And if, as the majority opinion suggests, the sanctions provided in Arts. 283 and 286 were inadequate and "not effective for the considerations of large businesses and busy prosecutors," thus dictating a need for injunctive process, that sanction could easily have been added by the Legislature for enforcement of the existing Sunday closing laws without the necessity of enacting a Sunday opening law.

Incidental Questions

Before writing at some length on my main point of disagreement with the majority, perhaps I should indicate certain incidental points of agreement and disagreement.

I agree with the holding that the pleas of unconstitutionality were pleas in bar and not pleas in abatement, and that the judgment of dismissal was, therefore, improper, and may be treated as meaningless. *Texas Highway Department v. Jarrell*, 418 S.W.2d 486 (Tex. Sup. 1967); *Kelly v. Shaff Creek Oil Co.*, 158 Tex. 180, 309 S.W.2d 308 (1958); 1 TEX. JUR. 2d 19-23, *Abatement and Revival* §§ 3-5. I agree that Rule 71, Texas Rules of Civil Procedure, authorizes us to treat the pleas in abatement as pleas in bar; that the take nothing judgment may be considered as the only proper judgment, and that we have jurisdiction of the direct appeal.

I agree that we do not have jurisdiction to decide whether section 1 of Art. 286a is applicable only to "persons" or whether it is applicable also to corporations.

I agree that the constitutionality of Art. 286a was not decided in *State v. Shopper's World*, 380 S.W.2d 107 (Tex. Sup. 1964). To the contrary, the opinion in that case indicates painstaking care that our decision concerned only a proper construction of Section 6, since repealed.

I disagree with the majority's interpretation of section 1 of Art. 286a. The majority has interpreted the section

to mean that if *one* of the enumerated articles of merchandise is sold on Saturday, the merchant is not only prohibited from selling that article on Sunday but is prohibited also from selling on Sunday any of the other forty-five items or categories of items. I suggest that the majority interpretation is not the proper grammatical interpretation of the section. The section provides that "[a]ny person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale: . . . any clothing; clothing accessories; . . . lawn mowers or cloth piece goods shall be guilty of a misdemeanor." Use of the words "any" and "or" require, in the absence of something indicating a different legislative intent, that the section be interpreted to read as follows: "Any person who sells *any* clothing on the consecutive days of Saturday and Sunday; *or any* clothing accessories on the consecutive days of Saturday and Sunday; *or any* lawn mowers on the consecutive days of Saturday and Sunday . . . ." The fact that the various items are separated by semicolons rather than by commas does not alter the rule, and I find nothing in the section supporting the majority finding of a different legislative intent. It hardly makes sense to find that the Legislature thought that a seller of motor vehicles on Saturday might sell bed coverings or household linens on Sunday and that he should be punished if he did. If the Legislature had intended to make a person selling one of the items on Saturday subject to penalties if he sold another on Sunday, it could have so provided in very simple language.

Due Process

As is apparent from the majority opinion, appellees attack the constitutionality of Act 2010-760 on a number of grounds. If any one of the grounds of attack is sound, the trial court's take-nothing judgment is correct and should be affirmed. In my opinion the statute is unconstitutional

stitutional because it operates to deprive appellees of their property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and of § 19, Art. I, Constitution of Texas.

Persons engaged in selling the items of merchandise listed in section 1, Art. 286a, are engaged in a legitimate activity, and a legislative prohibition of the sale of such items, or limitation on the right to sell them, can only be squared with constitutional due process if it is a legitimate exercise of the police power. The legislative prohibition or limitation contained in the statute does not represent a proper exercise of the police power unless there is a reasonable relationship between its prescriptions and the protection of the public health, safety, morals or general welfare. Standards for determining whether such a relationship exists are anything but precise. We summarized them in *State v. Richards*, 157 Tex. 160, 301 S.W. 2d 597, at 602 (1957), in these words:

> "The line where the police power of the state encounters the barrier of substantive due process is not susceptible of exact definition. As a general rule the power is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort and convenience as consciously as may be with private property rights. The guarantee of due process does not deprive the state of the right to take private property by the exercise of such power is a proper and lawful purpose but it is essential that the power be used for the purpose of accomplishing, and as a means appropriate to the accomplishment of the purposes for which it exists."

Section 1 of Art. 286a declares that the Act's purpose is "to promote the health, morals and welfare of the people of this state." With the legislative declaration that the Act's purpose is to promote the health, morals and welfare of the people is not enough to show that

the proscriptions contained in the Act *will in fact* promote or protect the health, recreation and welfare of the people.

> "[T]he cases are in complete accord in holding that a mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not of itself bring such statute within the police power of a state. Governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of the legislation in question. Hence in the exercise of such power, the legislature cannot, by its mere fiat, make that reasonable which is, indisputably, unreasonable." 16 Am Jur 2d 546, *Constitutional Law* § 281.

If the rule were otherwise, "it would always be within legislative power to disregard the constitutional provisions giving protection to the individual." *Hancock Life Ins. Co. v. Liberal Dailies*, 98 Tex. 206, 81 S.W. 645, at 652 (1905). The Legislature has "[n]o discretion . . . to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." *State v. Redmon*, supra. While a state may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them, constitutional provisions having been violated if it is the duty of the court to determine whether the challenged provision has a reasonable relation to the protection of purchasers. The public [illegible] to accomplish the purpose for which it was enacted. *Lee Hoagland v. Hogan*, 261 S.W. 2d 801, at 807 (1953).

public health, welfare and recreation is benefited. This brief will not be lengthened by reciting the many public benefits Article 286a, Texas Penal Code is calculated to give the public generally."

Laws which reduce traffic congestion and laws which afford family members an opportunity to relax together at a common time undoubtedly bear a reasonable relationship to public health, recreation and welfare; but, can it reasonably be said that Art. 286a will do either of these things?

The State's argument of public benefits is premised upon the statement that "the act is calculated to decrease the number of mercantile establishments that remain open on Saturday and Sunday . . ." The premise seems clearly to be false. Under the law as it existed at the time Art. 286a was enacted no stores which dealt solely in one or all of the merchandise listed in section 1 could legally be open for business on Sunday. Art. 283 prohibited labor on the Sabbath and Art. 286 prohibited any merchant or dealer in the merchandise from permitting his place of business to be open for the purpose of traffic. If we assume that, with Art. 286a in effect, those persons who dealt solely in one or all of the listed merchandise, and those persons who could not operate their places of business profitably for both days without selling some of the listed items of merchandise, would be forced by economic necessity to keep their places of business closed on either Saturday or Sunday, we could reasonably conclude that the Act is calculated to reduce the number of mercantile establishments which remain open on Saturday. Upon the other hand, if the Act is calculated to increase the number of establishments which remain open on Sunday, then, prior to Art. 286a none was legally open on Sunday. The question then posed by the State's argument is whether or not Art. 286a has the effect of increasing the number of establishments which remain open on Sunday.

and work on Sunday. The practical effect of the statute in this context appears to be just the reverse of its stated purpose.

As to the traffic reduction argument, the majority has already declined to embrace or approve the State's commonplace of rest argument. Indeed, the majority has rejected as implausible here the common-law of rest philosophy so eloquently pervading the majority and concurring opinions in the four 1961 Supreme Court Sunday closing law cases. Instead, the majority has invented a "secular, work-oriented, recreation-commerce" philosophy, and suggests that the due process attack is without validity because the new rationales should be more satisfactory to Sabbatarians. Relief of religious burdens may avoid constitutional law conflict, but I am at a loss to understand how relief of such burdens can create a reasonable relation between the statute's proscriptions and the public health, morality and welfare. I will abandon the matter at this point, appalled at the depth of analysis the majority of the Supreme Court uses.

shops and the doing of any labor, business or work on Sunday, with certain exceptions. A Pennsylvania law was under attack in the last two cases. It provides that whoever shall sell on Sunday certain items of merchandise shall be subject to a fine. The items listed are almost identical with some of those listed in section 1 of Act 286a. The Supreme Court upheld the validity of the statutes of the three states against almost every conceivable constitutional attack, including violation of due process. It is to be noted, however, that the Maryland and Massachusetts statutes are true Sunday closing laws, comparable to the Texas statutes before enactment of Art. 286a, and that the Pennsylvania statute was considered as having the effect of a Sunday closing law. Notice should be taken of this point that crucial to the Court's decisions was the common sky of social philosophy. This, said the Court over and over again, was the sustainable *purpose* of the various laws.

In *Two Guys v. Maryland*, supra, the Court said

> "The present purpose and effect of most of them [Sunday closing laws] is to provide a uniform day of rest for all citizens." 366 U.S. at 426.

> "It is true that *if the State's interest were merely to provide for its citizens a uniform day of rest* a wholly secular legislature might have some difficulty in demonstrating that exempting one day rather than another from the choice of the day to the individual would suffice.

> "However, the State's purpose is not merely to provide a day of rest, or even the recurrent regularity of a day of rest common to most workers. In addition to those the State seeks to set apart one day in which people may devote themselves to family, religious, and other activities unrelated to work. The fact that this day is the traditional day of rest, coupled with the fact that it is the day when most people are free from work, gives assurance that the day will consist of more than mere abstention from labor, but will allow the opportunity for people to join in activities with others." 366 U.S. at 428.

friends and relatives who are not available during working days." 366 U.S., at 450.

"Obviously a State is empowered to determine that a rest one day in seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends and relatives might spend together. Furthermore, it seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common day of rest provision.

"Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainment, for dining out, and the like." 366 U.S., at 451.

If the Supreme Court of the United States has correctly stated the purposes of laws requiring the closing of mercantile establishments on one day a week, that purpose can be effectuated only by laws which require closing on Sunday. It cannot be effected by laws which give a merchant a choice of closing on some day of the week or on another specific day of the week. It follows that the prescriptions of Act 2 [illegible] are reasonably related to the health, recreation or welfare of the people, and, therefore, that the Article is a reasonable exercise of the police power, and should be declared constitutional.

Roszel W. Cravens
Chief Justice

Delivered: November 6, 1962

Associate Justices Smith and Greenhill join in this dissent.

Judgment

SUPREME COURT OF TEXAS

November 5, 1969.

No. B-1255.

THE STATE OF TEXAS

v.

SPARTAN'S INDUSTRIES, INC., ET AL.

Direct Appeal from Bexar County.

This cause came on to be heard on direct appeal from the 45th Judicial District Court of Bexar County, Texas, and the original transcript and briefs and arguments of counsel having been duly considered, because it is the opinion of the Court (Chief Justice Calvert and Associate Justices Smith and Greenhill dissenting) that there was error in the judgment of the District Court, signed and entered on the 11th day of December, 1968, it is therefore, *adjudged, ordered* and *decreed* that the judgment of the District Court be, and hereby is, reversed and set aside, and that this cause be, and hereby is, remanded to the District Court for further proceedings, in accordance with the opinion of this Court herein this day delivered.

It is further ordered that appellees, Spartan's Industries, Inc., Barker's of San Antonio, Inc., Shoppers World of San Antonio, Inc. and Globe Stores, Inc., pay all costs in this cause expended and incurred in this Court, that petitioner, The State of Texas, have and recover of and from respondents, (above named), the costs by it expended and incurred in said Court, and that this decision, with a copy of the opinion, be certified to the District Court of Bexar County, Texas, for observance.

APPENDIX C.

List of Appellants

Spartan's Industries, Inc.
Shoppers World of San Antonio, Inc.
Barker's of San Antonio, Inc.
Globe Stores, Inc.
Allen Wilson
Charles Russell
Clifford Harm
John Talamantez
Bill Young
Bob Moore
Tino Longoria
Pat Williams
Ralph Parks
Lou Giovinazzo
Ben Horovitz
Roland Elledge
Jack Forbstein
Robert Thierry
Norman Crowson
Charles Hellebusch

UPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 2, 1970
JOHN F. DAVIS, CLERK

NO. 1255

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

SPARTAN'S INDUSTRIES, INC., ET AL.,
Appellants

v.

THE STATE OF TEXAS,
Appellee

On Appeal From The Supreme Court of Texas

MOTION TO DISMISS OR AFFIRM

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NO. 1255

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

SPARTAN'S INDUSTRIES, INC., ET AL.,
Appellants

v.

THE STATE OF TEXAS,
Appellee

On Appeal From The Supreme Court of Texas

MOTION TO DISMISS OR AFFIRM

Appellee, The State of Texas, respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Texas on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

I.

STATEMENT

The constitutional questions presented in Appellants' Jurisdictional Statement herein are identical to those which are fully discussed in Appellee's Motion to Dismiss or Affirm in *Sundaco, Inc. v. Texas,* No. 1271, of this Term, which also present no substantial federal question for review by this Court.

II.

THE NATURE OF THE CASE

A.

The State Statute Involved

This appeal raises the question of the constitutionality of Article 286a, Texas Penal Code, 1925, as amended, Acts 1961, 57th Leg., 1st Called Session, Ch. 15, p. 38) which prohibits the sale of 46 specified commodities on both the consecutive days of Saturday and Sunday, upon penalty of a fine up to $100, for the first offense, and a fine up to $500 for second and subsequent offenses, or imprisonment in jail up to 6 months, or both, and which provides that violations may be restrained by injunction.

B.

The Questions Presented

The Appellants, four discount stores and certain of their employees, contend that this statute bears no reasonable relation to the public welfare; that they are denied equal protection because the statute raises the penalty and threatens an injunction only against those who are in the business of selling the particularly enumerated articles; and that these commodities are set forth in terms so vague and indefinite as to render the statute constitutionally infirm.

C.

The Proceedings Below

Appellee brought this suit to enjoin the Appellants

from selling certain items of merchandise on both the two consecutive days of Saturday and Sunday in violation of Article 286a. By way of defense the Appellants attacked the constitutionality of this statute. The trial court, *without receiving evidence,* denied the permanent injunction on the ground that Article 286a was unconstitutional. Direct appeal was taken to the Supreme Court of Texas which upheld the constitutionality of the statute, reversed the judgment of the trial court, and remanded the cause to the trial court for further proceedings. *State v. Spartan's Industries, Inc.,* 447 S.W.2d 407 (1969).

III.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

This Court, on May 29, 1961, carefully considered and comprehensively analyzed and decided the constitutionality of various state Sunday laws in *McGowan v. Maryland,* 366 U.S. 420, *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.,* 366 U.S. 617; *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 366 U.S. 582; and *Braunfeld v. Brown,* 366 U.S. 599.

Following the legal principles applicable to determining the constitutionality of Sunday laws as established, or reaffirmed, in those cases, the Texas Legislature (on August 11, 1961) enacted Article 286a.

—Article 286a was superimposed upon existing Article 286, Texas Penal Code, which is a general Sunday closing law, prohibiting sales, or business openings,

punishable by a fine from $20 to $50 (subject to exceptions for drug stores, hotels, restaurants, sales of motor fuels, etc., as specified in Article 287) and which does not provide for injunctive relief, (similar to the situation presented to this Court in *Two Guys from Harrison*, *supra*).

In the above-cited cases it has been well established by this Court that a one-day surcease from commerce serves the general welfare of the public and is a proper exercise of the states' police power. It is further settled by these cases that it was within the power of the state to have concluded that businesses who were selling the enumerated items were particularly disrupting and that their violation of the law was of a different dimension, requiring a different remedy to facilitate enforcement.

Purpose of the Statute

The purpose of the statute is to promote the health, recreation and welfare of the people of the State of Texas (Article 286a; Section 4) by preventing the sale of certain articles seven (7) consecutive days.[1]

Although a one-day surcease from labor has never been unanimous (because exceptions are always allowed), the Sunday closing laws have been vigorously attacked by those who take a day of rest on some day

[1] Section 6 of the Session Laws is omitted from the codification of Article 286a; however, this section (the emergency clause) further clarifies the purpose of the statute and reads, in part, as follows:

> "Sec. 6. The fact that there are not now adequate laws to prevent the selling of certain articles seven (7) consecutive days and the further fact that legislation is needed to prevent and punish such offense. . . ."

(Acts 1961, 57th Texas Leg., 1st Called Session, Ch. 15, p. 38).

of the week other than Sunday (as in the cases cited above).

As stated by this Court in *McGowan v. Maryland*:

> "It is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual would suffice." (366 U.S. 450).

Article 286a serves this public purpose by providing a one-day surcease from labor (to occur on the week-end) and still alleviates the objections of the Sabbatarians by permitting sales of the specified commodities on either Saturday or Sunday (but not on both days) at the option of the merchant.

Equal Protection — Classification

Appellants contend they are denied equal protection of the laws because they are subjected to higher fines and injunctions only because they are in the business of selling the 46 enumerated commodities.

In answer to the same argument presented in *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 591, 592 (1961), this Court held that it was within the power of the state legislature to have concluded that these businesses (who were selling he enumerated items) were particularly disrupting and that their violation of the law was of a different dimension, requiring a different remedy, citing *Williamson v. Lee Optical*, 348 U.S. 483, 489, as follows:

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a

time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . a remedy there, neglecting the other."

This Court also stated in *McGowan v. Maryland*, 366 U.S. 425, 426 (1961):

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some equality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The Texas statute operates in the same manner as those of Maryland and Pennsylvania, in these regards, and does not, therefore, present a substantial question for review by this Court.

Vagueness

Appellants also contend that the prohibited commodities are set forth in terms so vague and indefinite as to render that statute unconstitutional.

The commodities enumerated in Article 286a are strikingly similar to those presented to this Court in *Two Guys From Harrison-Allentown, Inc. v. McGinley, supra*, and also reviewed by this Court in *Arlan's Department Store of Louisville, Inc. v. Kentucky*, 369 S.W.2d 9 (Ky.Appls., 1963); dismissed for want of a substantial federal question, 376 U.S. 186 (1964).

A South Carolina statute (Sec. 64-2.2, Code 1962) contains a list of commodities almost identical with those set forth in the Texas statute. The Supreme Court

of South Carolina, in *State v. Solomon,* 245 S.C. 550, 141 S.E.2d 818 (1965), held that statute not to be unconstitutionally vague. The appeal to this Court was dismissed for want of a substantial federal question. *Solomon v. South Carolina,* 382 U.S. 204 (1965).

A similar question of vagueness was rejected in *Whitney Stores, Inc. v. Summerford,* 280 F.Supp. 406 (1968). That judgment was affirmed by this Court, 393 U.S. 9 (1968).

In the instant case the Supreme Court of Texas (447 S.W.2d 407, 413), found that:

> "[V]irtually all of these terms are common words, which will be understood by any merchant. If a marginal or questionable case could be posed for the application of the word 'hardware,' for example, this would be no ground for vitiating an entire legislative enactment. United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947); Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951)."

Since no facts or evidence were presented in this case, the statute is not constitutionally infirm on its face, and there is no substantial question of vagueness presented to this Court for review.

IV.

CONCLUSION AND PRAYER

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or,

in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of Appellee's Motion to Dismiss or Affirm were served on the attorney for the Appellants by depositing same in the United States Mail, postage prepaid, certified mail, on this the ____ day of _____, 1970, addressed as follows: William H. Allen; Esquire, 888 Sixteenth Street, N.W., Washington, D. C. 20006.

ROBERT C. FLOWERS
Assistant Attorney General of Texas

SUPREME COURT, U. S.

FILED
APR 8 1970
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Nos. 1255, 1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SPARTAN'S INDUSTRIES, INC., ET AL., *Appellants*,

v.

THE STATE OF TEXAS, *Appellee*.

SUNDACO, INC., ET AL., *Appellants*,

v.

THE STATE OF TEXAS, ET AL., *Appellees*.

ON APPEALS FROM THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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April 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1255

SPARTAN'S INDUSTRIES, INC., ET AL., *Appellants*,

v.

THE STATE OF TEXAS, *Appellee*.

No. 1271

SUNDAY, INC., ET AL., *Appellants*,

v.

THE STATE OF TEXAS, ET AL., *Appellees*.

ON APPEALS FROM THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

I.

On the questions whether, because of its arbitrariness, Article 286(a) of the Texas Penal Code deprives appellants of liberty or property without due process of law or denies them the equal protection of the laws the State of Texas in its nearly identical motions in

these two cases asserts chiefly that a state may provide for a one day surcease from commerce as well as a common day of rest and that on this view the cases are governed by *McGowan* v. *Maryland*, 366 U.S. 420 (1961), and the other Sunday closing law cases of the 1960 Term. The Jurisdictional Statement in No. 1255, relied upon in No. 1271, makes clear that it is only because Sunday closing laws provide for a common day of rest that they have been sustained by this Court and state appellate courts and that, in any event, Article 286(a) does not necessarily result in even a one day respite from business. We do not believe that anything said by the appellants detracts from the showing thus made that the due process and equal protection questions are substantial.

II

On the question whether Article 286(a) is too vague to stand as a criminal statute, the state adduces as dispositive authorities three per curiam decisions of this Court disposing of appeals on the preliminary papers (along with *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1966), in which, as we noted in the Jurisdictional Statement in No. 1255, p. 18, no issue of vagueness was raised). Those authorities are not dispositive.

The first case cited by Texas is *Arlan's Dep't Store* v. *Commonwealth*, 369 S.W.2d 9 (Ky. 1963), *appeal dismissed per curiam*, 376 U.S. 186 (1964). In that case the question ruled upon by the state court and presented to this Court was whether a Sunday closing statute was void for vagueness because of its exception for any "work of necessity." This Court ruled that no substantial federal question was presented. How-

ever one may view that ruling, it does not conclude the very different question presented here whether a statute listing 46 categories of goods that cannot be sold on consecutive Saturdays and Sundays is void for vagueness because of the generality and ambiguity of some of the terms used in the list.

The second case is *State* v. *Solomon*, 245 S.C. 550, 141 S.E.2d. 818 (1965), *appeal dismissed per curiam*, 382 U.S. 204 (1965). There, questions as to the vagueness of South Carolina's Sunday laws were raised in the state court, but in this Court none of the questions presented related to vagueness. See Jurisdictional Statement, No. 588, O.T. 1965, pp. 2-3* This Court therefore could not have decided any vagueness question.

Finally, Texas cites *Whitney Stores, Inc.* v. *Summerford*, 280 F.Supp. 406 (D.S.C. 1968), *aff'd per curiam*, 393 U.S. 9 (1968). It is clear that the vagueness contention in that case did not relate to any provision comparable to the list of categories of items in Article 286(a). The claim was that the terms "work of necessity" and "novelties and souvenirs," which were among exceptions to the Sunday closing requirement of South Carolina law, rendered that law unconstitutionally vague. *Id.* at 410-11.

In short, the question whether Article 286(a) goes beyond constitutional limits in the vague way in which it describes what merchants may sell on consecutive

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* The only question argued in the jurisdictional statement was whether a Sunday law violated the free exercise of religion guarantee in its application to an orthodox Jew. Appellant reserved the right to argue two additional constitutional questions if probable jurisdiction was noted; neither of these related to vagueness.

Saturdays and Sundays is not directly answered by any decision of this Court. That question and the broader questions whether Article 286(a) and its scheme of classification are rationally related to any legitimate legislative purpose are substantial questions that warrant a hearing before this Court.

Respectfully submitted,

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April 1970